

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 453 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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DINESHBHAI NATHABHAI PARMAR

Versus

STATE OF GUJARAT

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Appearance:

MR KJ SHETHNA for Petitioner

MR SP DAVE, LD. APP for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 01/04/98

ORAL JUDGEMENT

1. This appeal has been directed against the impugned judgment and order dated 29/6/1987 rendered by the learned Special Judge, Vadodara in Special Case No. 9 of 1985. The appellant, hereinafter referred to as 'the accused', has been convicted of the offences punishable u/S. 161 of the Indian Penal Code (for short 'IPC') and section 5(2) of the Prevention of Corruption

Act, 1947 (for short 'PC Act') and has been sentenced to undergo rigorous imprisonment (RI) for a period of two years and six months and to pay fine of Rs.500/-, in default to undergo RI for a period of three months u/S. 5(2) of the PC Act, no separate sentence having been imposed u/S. 161 of the IPC.

2. The facts of the prosecution case might be referred to from the impugned judgment and order : One Hirjibhai Damarabhai Rathwa, who happens to be the uncle of complainant Vithalbhai Udesinh Rathwa, was the resident of village Muthai and he was holding certain agricultural lands on which he used to reside. . It appears that his lands at village Muthai had gone in submergence in the Sukhi Irrigation Project and, therefore, he had shifted and settled at village Chichod. He purchased a piece of land belonging to one Vithalbhai of a nearby village known as Umarva. The land so purchased by Hirajibhai was to be mutated in his name in the revenue records and, therefore, he was required to approach the accused, who was working as the Talati-cum-Mantri at village Chichod. It has been alleged that the complainant Vithalbhai Rathwa and his uncle Hirjibhai met the accused on 14/11/1984 at his office at Chichod and at that time the accused demanded illegal gratification in the sum of Rs.800/- for mutating the entry in the revenue records. The accused told the complainant and his uncle Hirjibhai that the accused would come to the residential house of Hirjibhai at Chichod on 18/11/1984 between 9.00 a.m. and 3.00 p.m. and would make the necessary entry in the revenue record and would collect the aforesaid amount. As the prosecution case proceeds, the complainant Vithalbhai went to Baroda and had seen the A.C.B. Inspector Shri Mehta on 17/11/1984 lodging his complaint at about 16.15 hours. Mr. Mehta asked the complainant to appear before him at A.C.B. Office at Vadodara on 18/11/1984, the next day at 7.00 a.m. Accordingly, the complainant Vithalbhai had gone to A.C.B. office at Vadodara (Baroda) on 18/11/1984. Thereafter he, Mr. Mehta and some other officers of the A.C.B. Office, Baroda, started at about 7.15 a.m. and reached Sukhi Irrigation Guest House. Two panchas were called. The complainant had produced the currency notes of Rs.800/- which were smeared with anthracene powder by one Mr. Shermohammed, the constable and later on he had placed the said currency notes in the left pocket of the shirt put on by the complainant Vithalbhai and accordingly the first part of the Panchnama was completed. As per the prior arrangement, the Panch no. 1 and the complainant had gone to the house of Hirjibhai at Chichod and the members of the

raiding party, Inspector Mr. Mehta and Panch no. 2 kept waiting outside the house. The complainant had placed the currency notes in the pocket of Hirjibhai, his uncle, since it was agreed that the accused would accept the currency notes from Hirjibhai Rathva. It is the prosecution case that the accused appeared at the house of Hirjibhai at about 11.45 a.m. and thereafter he and the son of his peon had the lunch at the house of Hirjibhai. Thereafter, the accused had opened his records and at about 2.15 p.m. he had demanded illegal gratification as agreed earlier and Hirjibhai had taken out the currency notes from the pocket of his shirt with his right hand and the accused accepted the said currency notes with his right hand, counted the same and placed them in the pocket of his jersey. Panch No. 1 had gone outside and he had given the pre-arranged signal, as a result of which the members of the raiding party had entered into the house of Hirjibhai and the accused was apprehended. The currency notes were recovered from the left side pocket of the jersey on the person of the accused. His ball pen, his register and the pocket of jersey had shown the presence of anthracene powder in the light of ultra violet lamp. The second part of the panchnama was accordingly completed.

3. On the basis of the aforesaid proceedings the offences were registered, sanction was obtained and ultimately the accused came to be charge-sheeted on 25/10/1985. Charge was framed at exh.6. The accused pleaded not guilty to the charge. After the evidence was recorded and statement of the accused u/S. 313 of the Code of Criminal Procedure, 1973 (II of 1974) was recorded and the arguments on behalf of the accused as well as on behalf of the State were heard, the learned Special Judge rendered the impugned judgment of conviction and sentence as aforesaid. That is how the accused has been before this Court.

4. It has been the defence of the accused that indeed he had accepted the currency notes of Rs.800/- from Hirjibhai, but that was on account of the fact that Hirjibhai had taken a loan of Rs.900/- from him while executing necessary writing in that respect and had returned a sum of Rs.100/- to the accused on 14/11/1984 and the balance amount of Rs.801/- was returned on 18/11/1984. Thus, the acceptance of the currency notes in question was not by way of illegal gratification, but was a legal receipt in the form of return of balance loan amount by the complainant.

5. In order to make good the aforesaid defence Mr.

K.J. Shethna, learned counsel appearing for the appellant has read before this Court the prosecution evidence during the course of which the writing stated to have been executed by Hirjibhai was placed on record at exh. 16 since, Hirjibhai had admitted his signature without admitting the contents thereof.

6. The prosecution has examined following witnesses :-

- i) P.W. No.1 Vithalbhai Udesinh Rathva, complainant, exh. 11
- ii) P.W. No.2 Hirjibhai Damarabhai Rathva, exh. 13
- iii) P.W. No.3 Chatursinh Abhesinh, exh. 17 (who was panch no. 2)
- iv) P.W. No.4 Prabhashnakar P. Mehta, exh. 19, who happened to be A.C.B. Inspector at Vadodara at the relevant point of time.

The prosecution has placed on record following documents :-

- i) sale-deed executed by Vithalbhai Nagjibhai in favour of Hirjibhai Damrabhai Rathva in respect of land bearing survey no. 254/210 situated in the sim of village Chichod on 24/9/1984.
- ii) communication addressed by Hirjibhai to the Sarpanch of village Chichod on 1/9/1984, exh. 15,
- iii) writing described as a receipt dated 9/9/1984 exh. 16,
- iv) panchnamas exhs. 18/1 and 18/2
- v) complaint exh. 20
- vi) list of Muddamal articles concerning the Muddamal notes of the denomination of Rs.100/- each , one note of Re.1/-, records of rights, one jersey, one ball pen and the papers concerning the record of rights.
- vii) list of Muddamal articles concerning complainant's uncle Hirjibhai Damrabhai Rathva, namely his shirt with two pockets thereof,
- viii) Muddamal article concerning Vithalbhai Udesinh Rathva, namely his shirt containing two pockets exh. 23 and
- ix) sanction order exh. 24.

Over and above the aforesaid documents one printed patrika for election of Vithalbhai has also been placed on record at exh. 12.

7. The facts of the prosecution case found their place in the evidence of the complainant as also

Hirjibhai. It has also been placed on record by the concerned witnesses that the complainant had produced 8 currency notes of Rs.100/- each before the concerned A.C.B. officer and the panchas and later on the currency notes were smeared with anthracene powder and were inserted in the pocket of the complainant Vithalbhai. It is to be found in the evidence that at a later point of time Vithalbhai had inserted the currency notes in the pocket of his uncle Hirjibhai in the presence of Panch No. 1 and Hirjibhai had handed over the currency notes to the accused as per the detailed facts appearing in the evidence of Vithalbhai and Hirjibhai. This happened in the presence of Panch no. 1 upon whose signal the members of the raiding party immediately appeared at the scene of offence and recovered the currency notes from the pocket of jersey put on by the accused. It might also be noticed from the prosecution evidence that the relevant Muddamal articles which had passed on from the complainant to his uncle Hirjibhai and then to the accused had displayed marks of anthracene powder in the light of ultra violet lamp as per the detailed facts with regard to performance of such experiment at the relevant points of time. It is to be noticed that the prosecution case with regard to passing of the currency notes in question has not been challenged. On the contrary, it is the say of the defence that the accused had accepted the currency notes from Hirjibhai, but he did so not by way of acceptance of illegal gratification, but by way of return of balance loan amount as stated above. The evidence adduced by complainant Vithalbhai and his uncle Hirjibhai has been dealt with and considered by the learned Special Judge and for the reasons set out by him, the same would deserve acceptance. However, while dealing with the evidence of Hirjibhai and the complainant it has to be borne in mind that Hirjibhai admitted his signature on the writing which was described as a pro-note by the defence, appearing at exh. 16. He, however, denied the allegations that he had taken loan of Rs.900/- and, therefore, he executed the writing described as pro-note appearing at exh. 16. There has been a detailed discussion of the submissions made in respect of writing exh. 16 styled as a promissory note. Section 118 of the Negotiable Instrument Act was pressed into service on behalf of the defence. Reference was made to a couple of decisions of the Hon'ble Supreme Court in respect of presumption of consideration arising under the said provision. All that was done for rebutting the presumption that would arise u/S. 4(1) of the PC Act. All these submissions have been repeated before this Court. Before the same are dealt with, it would be important to find out whether exh. 16 can be

said to be a promissory note which would call for applying rule of presumption as appearing in sec. 118 of the Negotiable Instrument Act. In the first instance the writing exh. 16 is described as a receipt at the top of the writing. Then there is a recital with regard to Hirjibhai Damrabhai Rathva having borrowed Rs.901/- from the accused. Then there is a recital with regard to that amount having been received by Hirjibhai Damrabhai Rathva. Then there is a recital with regard to Hirjibhai Damrabhai Rathva executing the writing of his free will. Then there is a recital in the form of a condition that if Hirjibhai Damrabhai Rathva would not pay the said amount within six months, the accused would be entitled to recover the same with expenses through court. Finally there is a recital of the writing having been executed at village Chichod, with the date '9/9/1984'. On a bare look at the writing exh. 16 it can be said that it does not contain any of the required characteristics of a negotiable instrument in the form of promissory note. Therefore, the submissions with regard to raising of presumption of consideration upon the admission of signature of Hirjibhai Damrabhai can hardly arise. It is no-doubt true that the defence is not required to rebut the presumption beyond reasonable doubt. It would be sufficient if from the facts and circumstances placed on record that the presumption is shown to have been rebutted. It is from this point of view that the writing exh. 16 will have to be considered. The learned Special Judge placing reliance upon a decision in the case of Chaturdas Bhagwandas v/s. The State of Gujarat reported in AIR 1976 S.C. 1497 has proceeded to consider the defence in the same manner. The learned Special Judge has accordingly observed that though the writing was for the loan amount of Rs.900/-, the accused had accepted the sum of Rs.800/- only from Hirjibhai at the relevant point of time. The accused tried to explain this position by saying that the amount of Rs.100/- was returned by Hirjibhai on 14/11/1984. However, no cross-examination has been directed towards the alleged part payment of Rs.100/-. It was also submitted that since Hirjibhai used to take loan amount from the accused he did not go to the A.C.B. Office and instead Vithalbai had gone to the A.C.B. Office for giving FIR. The learned Special Judge has also proceeded to explain the defence by making a reference to the writing exh. 16 which was admittedly signed by Hirjibhai, but was not in the hand writing of Hirjibhai. It was not the say of the accused that he had written out the contents of the writing. None else was examined before the learned Special Judge to show that exh. 16 was written by X or Y and signed by Hirjibhai. The learned Special Judge has under such circumstances

observed that first the signature of Hirjibhai might also have been obtained and later on the writing might have been adjusted in exh. 16. All these possibilities have not been explained by the defence. The matter does not rest here. The most important of the circumstances is the recovery of revenue records at the scene of offence, namely from inside the house of Hirjibhai. In this connection, the learned Special Judge has observed that if it is accepted that the accused had gone to receive back the loan amount he would hardly take with him the necessary revenue records in the form of Muddamal articles nos. 3, 4 and 5. Moreover, there would never have been occasion for him to start making the necessary entry in the revenue record at the house of Hirjibhai. As can be seen from the prosecution evidence the ball pen and the revenue record had shown the presence of marks of anthracene powder when shown in the light of ultra violet lamp. The revenue record would show that necessary entries were being posted. The accused has failed to explain this extremely vital circumstance at any point of time and at any stage. Even in the memo of appeal there is no valid and acceptable explanation coming forth in so far as the facts concerning Muddamal articles nos. 3, 4 and 5 as aforesaid are concerned. Even with regard to explanation in the form of return of loan amount was not tendered at the earliest point of time. In this connection, the learned Special Judge has placed reliance upon a decision of the Apex Court in the case of Tersem Lal v/s. State of Haryana reported in 1987 Criminal Law Journal 715. Following observations appearing in para. 6 of the citation have been reproduced by the learned Special Judge and there is no explanation to the application thereof in the present case :-

"The explanation given by the appellant which was seriously pressed by the learned counsel for the applicant was that he had received this amount to be deposited in the small savings scheme on behalf of Gian Singh, but it is significant that neither he had made any note of this fact nor given any receipt to Gian Singh. Apart from it, it is significant that the sub-Divisional Officer who was a revenue officer and the appellant being a Patwari was his subordinate. The normal conduct of the appellant would have been to tell him as soon as he arrived for search that in fact he had received this amount to be deposited in small savings scheme. It is impossible to believe that if the appellant had received this amount for being deposited in the small savings scheme, he would have not opened his mouth and

permitted the search and recovery of this amount from his pocket to be done by the Sub-Divisional Officer and allowed the matter to be handed over to the police and still would not have come out to say what he chose to say at the trial. This conduct of the appellant in not coming out with this explanation instantaneously goes a long way to make this explanation just an afterthought specially when sub-Divisional Officer conducted the search and recovered this amount from his person. In this view of the matter, therefore,

in our opinion both the Courts below were right in discarding this explanation of the appellant.

We therefore see no substance in this contention advanced on behalf of the appellant." (Emphasis supplied).

8. Mr. Shethna, learned counsel for the appellant has referred to certain aspects of the prosecution case from the evidence of the aforesaid witnesses which lead the prosecution case till upto the time the amount of Rs.800/- came to be accepted by the accused. However, minor discrepancies which have been pointed out by Mr. Shethna will hardly have any place in view of the fact that the recovery of tainted notes in question has not been in dispute. Mr. Shethna has also made a reference to following decisions :-

- i) Sita Ram v/s. State of Rajasthan reported in AIR 1975 S.C. 1432,
- ii) Suraj Mal v/s. State reported in AIR 1979 S.C. 1408,
- iii) Man Singh v/s. Delhi Administration reported in AIR 1979 S.C. 1455,
- iv) M. Mahboobkhan Pathan v/s. State of Maharashtra reported in JT 1997 (2) S.C. 232, and
- v) Gulam Mahmood v/s. State of Gujarat reported in AIR 1980 S.C. 1558.

In my opinion all the aforesaid five decisions would hardly have any application if the peculiar facts and circumstances of the present case are noted, particularly the circumstances which revolve round the records of rights having been taken by the accused at the residential place of Hirjibhai and appearance of marks of anthracene powder on the said books of records of rights and other relevant documents as also the ball pen with which the accused was making the necessary entry.

9. In above view of the matter and bearing in mind the facts and circumstances of the case, the defence has



failed to establish or show any plausible or acceptable explanation for acceptance of Rs.800/- in question.

10. In the result, I have no reason to differ from the conclusions reached to by the learned Special Judge and the reasons given in support thereof while convicting the accused.

SENTENCE :

11. Today the accused has filed an affidavit dated 31/3/1998 inter-alia stating therein that he has been aged 41 years and after the date of incident he was suspended from his service as a Talati-cum-Mantri where he was serving from 1983. According to him, on account of the false case having been filed against him he had sustained mental illness from 1986 and since then he had been under the treatment of such illness from Dr. Harkant Raval, Vadodara. He has become indebted to the tune of Rs.10,000/-.

He has further asserted that he has a wife and two daughters respectively aged 16 years and 14 years studying in S.S.C. and 9th standard and one son aged about 11 years studying in 4th standard. He belongs to Rohit caste being a scheduled caste.

His father Nathabhai aged 57 years has been suffering from Arthritis and is about to retire from his service as a Bailiff in Civil Court at Chhota Udepur. His mother Revaben is aged 55 years. She is suffering from the trouble of Gall Blader stone. She has also been suffering from Kidney stone.

There is no one to maintain his family except his father.

12. In so far as facts stated in the affidavit are concerned, no exception has been taken by the prosecution. However, according to the Ld. A.P.P. the most of the reasons set out in the affidavit cannot be said to be special reasons. Having heard the learned counsel for the appellant and Ld. A.P.P. for the State, I am of the opinion that three of the reasons set out in the affidavit are quite special reasons as per section 5(2) (proviso) of the PC Act. They are (i) mental illness of the accused prior to the date of the impugned judgment and order and, therefore, the same can be taken into consideration as a special reason on the question of sentence, (ii) illness of father as described hereinabove and (iii) illness of mother in as much as she has been suffering from Gall Blader stone and Kidney stone.

13. Relying upon the decisions of the Apex Court in the case of B.C. Goswami v/s. Delhi Administration reported in AIR 1973 S.C. 1457 and Sarupchand v/s. State of Punjab reported in AIR 1987 S.C. 1441 it has been submitted on behalf of the appellant that considering the aforesaid special reasons as well as the passage of time to the extent of nearly 11 years since the date of impugned judgment and order the appellant should not be sent to prison. It has been submitted that no useful purpose would be served in view of the aforesaid circumstances in sending the appellant to the prison after a passage of such a long lapse of time and in the face of the aforesaid special circumstances. In my opinion, the special circumstances set out in the affidavit as noted hereinabove would merit consideration for altering the order of sentence as stated below. Hence, following order is passed :-

In the result, this appeal is dismissed in so far as conviction is concerned. However, in so far as sentence is concerned, bearing in mind the special circumstances noted hereinabove, the substantive sentence imposed against the appellant - accused - Dinesh Nathabhai Parmar is hereby set aside and he is directed to undergo sentence till the rising of the Court. However, fine is enhanced from Rs. 500/- to Rs.2,000/and since fine of Rs.500/- has already been paid as per the application in the main record, he is directed to pay further amount of fine in the sum of Rs.1500/-, in default to undergo RI for three months.

Nazir of this Court to accept the amount of fine during the course of the day.

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\*\*PVR\*\* cr.a45387j.